91-262

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GUIBERSON OIL TOOLS DIVISION OF DRESSER INDUSTRIES, INC.,

Petitioner,

v.

CALVIN RHODES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals misapply equitable doctrines by estopping defendant employer from relying on the statute of limitations in the ADEA because the defendant asserted an allegedly pretextual reason for firing plaintiff, in conflict with holdings by the Fourth and Seventh Circuits that an employer's assertion of a pretext does not justify estoppel or equitable tolling?

2. Did the Court of Appeals misapply equitable doctrines by estopping defendant employer from relying on the statute of limitations in the ADEA although plaintiff asserted on appeal that "OUR CASE IS NOT, REPEAT, IS NOT, EQUITABLE ESTOPPEL; IT IS EQUITABLE TOLLING" based on plaintiff's claim that his cause of action did not arise until a replacement was hired two months after plaintiff was discharged?

3. Did the Court of Appeals exceed the scope of review under Rule 52(a)?

LIST OF PARTIES

The parties to the proceeding below are set forth in the caption. Guiberson Oil Tools is a division of Dresser Industries, Inc., which has the following subsidiaries that are not wholly owned:

Airetool and Yost Superior Realty, Inc.
Dresser Finance Corporation
Dresser Foundation, Inc.
Dresser Holding, Inc.
Dresser Industries, Inc.
Dresser International Sales Corporation
Dresser International, Ltd.
Dresser Minerals International, Inc.
Dresser Services, Inc.
Dresser-Nagano, Inc.
IRI International Corporation
Masoneilan International, Inc.
Property & Casualty Insurance, Ltd. - U.S.
Pump Investments, Inc.
Worthington Corporation
Worthington International Holdings, Inc.
Worthington Pump Inc.
Worthington do Brasil, Inc.

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The petitioner, Guiberson Oil Tools Division of Dresser Industries, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion entered in the above-entitled proceeding on April 3, 1991, with petition for rehearing denied on May 15, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 927 F.2d 876, and is reprinted in the appendix hereto at A1.

The opinion of the United States District Court for the Eastern District of Louisiana (Chasez, U.S.M.) is unreported and is reprinted in the appendix hereto at A13.

JURISDICTION

Respondent invoked the federal question jurisdiction of the District Court pursuant to 28 U.S.C. § 1331 (West Supp. 1991) and 29 U.S.C. § 626(c) (West 1985). The opinion of the District Court, captioned "Order and Reasons", and the judgment of the District Court, both dated February 13, 1990, were entered on February 15, 1990. A13, A18. Respondent appealed from the judgment of the District Court, and on April 3, 1991, the Court of Appeals for the Fifth Circuit entered a judgment and opinion reversing and remanding the judgment of the District Court. The Fifth Circuit denied Guiberson's petition for rehearing on May 15, 1991. This petition for a writ of certiorari has been filed within 90 days of May 15, 1991. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1) (West Supp. 1991).

STATUTE INVOLVED

This case involves the application of the doctrines of equitable modification to the time limit set forth in 29 U.S.C. § 626(d) (West 1985), § 7(d) of the Age Discrimination in Employment Act of 1967 ("ADEA"), which reads as follows:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed --
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the

> individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

STATEMENT OF THE CASE

The Underlying Facts

Dresser Industries, Inc. ("Dresser") sells services and equipment to the oil field industry. From 1955 until March of 1986, plaintiff-respondent Calvin Rhodes sold wireline products[1] for the Atlas Division of Dresser ("Atlas") and the corporate predecessors of that Division.

The collapse of oil prices in the early 1980's and the resulting sharp decline in domestic oil drilling and production created hard times for the oil field services industry, including Dresser and its Atlas Division. In response to these economic difficulties, Atlas reduced the size of its sales force from 70 to 25 through major layoffs occurring in 1984, 1985, and early 1986. In each round of layoffs, Atlas attempted to retain the strongest performers and to let go the least productive personnel. Tr. 364-67, 370.[2]

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[1] Wireline products electronically read the geophysics of a well.

[2] "Tr." references are to the trial transcript.

Rhodes survived each of these reductions in force. In March of 1986, however, faced with the need to reduce the sales force still further, Rhodes' immediate supervisor decided to let Rhodes go. Rhodes was selected for that round of layoffs based on his lack of technical ability, in comparison to the other remaining sales personnel, and his declining customer base. Rhodes' supervisor personally informed him both of his layoff and of the reasons for it. Tr. 370-72.

Before Rhodes' termination from Atlas became effective, however, a company official found Rhodes a sales position with Atlas' Compac product line.[3] Rhodes accepted the transfer in lieu of termination. The Compac product line itself was transferred from Dresser's Atlas Division to petitioner Guiberson Oil Tools Division ("Guiberson") effective November 1, 1986, although Guiberson assumed operating control in August 1986.

The Compac Product Group faced the same difficult economic climate as the portion of Atlas for which Rhodes had previously worked. By October of 1986, Compac faced the need to reduce the size of its work force. Lee Snyder, the Compac sales manager who supervised Rhodes, informed Rhodes on October 15, 1986 that he would be laid off as of November 1. Snyder selected Rhodes for termination along with a 32 year-old "technical representative" because they were his least productive employees.[4] Tr. 339; Joint Exhibit ("Jt. Ex.") 1, pp. 62-63.

Snyder himself was demoted from sales manager to a sales representative position effective November 1, the effective date of Rhodes' termination. At that time, Snyder serviced Rhodes'

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[3]The Compac product line consists of tubing conveyed perforating products, a technology different from the wireline products Rhodes had been selling.

[4]Earlier in 1986, Snyder had terminated a 27-year-old sales representative as part of the continuing reduction in force. Jt. Ex. 1, p.46.

territory and customers. Tr. 474. On November 11, a 42 year-old salesman named Richard Attaway applied for a job with Compac. On December 15, 1986, Attaway was given a three month contract as a sales representative so that his productivity could be assessed before he became a permanent employee. Tr. 593-97. Rhodes learned of Attaway's hiring on December 19 when he made a social call to his former office. Aff. of Calvin Rhodes, June 20, 1989; Tr. 319-20. Snyder himself lost his job in January of 1987. Tr. 276.

On April 28, 1987, 195 days after he learned on October 15, 1986 that he had been terminated and 130 days after he learned that Attaway had been hired, Rhodes filed a complaint with the Equal Employment Opportunities Commission claiming that he had been discriminated against because of his age. Approximately a year later, Rhodes informed the EEOC that he intended to file a civil action and asked the EEOC to stop processing his complaint.

The Proceedings Below

Rhodes' complaint came to trial before a jury and a magistrate, who presided by consent of the parties under 28 U.S.C. § 636(c) (West Supp. 1991). The parties further agreed that the jury would determine only the question of liability and that all other issues, including damages, would be determined by the magistrate judge. After four days of trial, the jury found that Rhodes had been terminated because of his age but that Guiberson had not acted willfully when it terminated Rhodes.[5] Tr. 705.

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[5]The jury was instructed that it should find Guiberson liable for willful discrimination if Rhodes had been fired because of his age and "the defendant knew that its discriminatory conduct was prohibited by law, or showed a reckless disregard of whether or not its discriminatory conduct was prohibited by law." Tr. 674.

Following the jury verdict, the magistrate considered Guiberson's contention that Rhodes' claim was barred.[6] Relying on *Chardon v. Fernandez*, 454 U.S. 6 (1981) and *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the magistrate determined that the 180-day time period[7] had started running on October 15, 1986 when Rhodes learned of his termination.

Since Rhodes had filed his charge with the EEOC more than 180 days after October 15, the magistrate next considered the applicability of the doctrines of equitable modification. The magistrate focused on the question "whether the defendant in any way misled the plaintiff or attempted to conceal its alleged discrimination from him." A15. Although the magistrate accepted Rhodes' claim that he did not know he had an age discrimination claim until he learned of Attaway's hiring, she also concluded that Guiberson could not be held responsible for Rhodes' lack of knowledge. A16. The magistrate based that conclusion on her review of Rhodes' trial testimony, in which, she found,

> [Rhodes] sets forth no actions on the part of defendant calculated to force him, or any other reasonable person in his situation, to fail to approach the E.E.O.C. sooner than he did. The defendant did not indicate to plaintiff that he would not be replaced; nor did it indicate to him

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[6]Guiberson originally raised the statutory time limit issue in motions for summary judgment which were denied. Guiberson again raised the issue in a motion denominated a motion for a directed verdict. Since the question of the timeliness of the EEOC claim had not been confided to the jury by the parties, the magistrate treated the motion as one for involuntary dismissal pursuant to Fed. R. Civ. P. 41(b). *See* 927 F.2d at 879, A5-A6.

[7]There is no dispute that the 180-day time limit of 29 U.S.C. § 626(d)(1) (West 1985) applies to this case.

> that another person would not be hired in a sales position.

A16. For this reason, the magistrate concluded that Rhodes had not borne his burden of proof to establish an estoppel.[8]

On appeal, Rhodes urged the Fifth Circuit to consider the case under the doctrine of equitable tolling, not equitable estoppel.[9] Rhodes argued that equitable tolling provides relief from statutes of limitation until it is possible for a plaintiff to learn the facts essential to his claim. Since in Rhodes' view, "[t]he discrimination did not arise from the termination based upon reduction in work force, but based upon the later hiring . . ." of Attaway[10], Rhodes Repl. Br. 3, respondent claimed the statutory period should have been tolled until he learned of Attaway's employment.

The Fifth Circuit's analysis of this issue first attempted to clarify the distinction between equitable tolling and equitable estoppel. According to the Fifth Circuit, which purported to be

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[8]In light of her conclusion that Guiberson had no responsibility for Rhodes' failure to file in time, the magistrate did not reach the question of Rhodes' diligence and the reasonableness of any reliance by him on Guiberson's statements. A15.

[9]*See, e.g.*, Rebuttal Brief On Behalf Of Plaintiff-Appellant, Calvin Rhodes ("Rhodes Repl. Br.") 2 ("OUR CASE IS NOT, REPEAT, IS NOT, EQUITABLE ESTOPPEL; IT IS EQUITABLE TOLLING"); *id.* at 10 ("It was and is the position of the appellant in rebuttal that the judgment in this case applied the wrong principle of law; that is, equitable estoppel, and the principle of law that should have been applied, or at least distinguished, was and is equitable tolling.") Rhodes argued that equitable estoppel applies when the defendant induces a plaintiff to forego prosecuting a known cause of action, a claim Rhodes did not make. *Id.* at 3.

[10]*See also* Original Brief On Behalf Of Calvin Rhodes, Plaintiff-Appellant ("Rhodes Br.") 4 ("The claim did not arise until the younger man was hired at the reduced pay.")

following a line of distinction established by the Fourth Circuit, equitable tolling applies if the plaintiff was excusably ignorant of the discriminatory act, whereas equitable estoppel "examines the defendant's conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights." 927 F.2d at 878, A4 (quoting *Felty v. Graves-Humphreys Co.*, 785 F.2d 516, 519 (4th Cir. 1986)). The court concluded, despite Rhodes' urging to the contrary, that the case before it involved the doctrine of equitable estoppel, not equitable tolling, "because Rhodes claims he was untimely because Guiberson Oil mislead [sic] him about the reasons for his discharge." *Id.* at 879, A5.

Turning to the merits of that claim, the Fifth Circuit identified as the magistrate's "primary fact findings" her conclusions that Guiberson "did not indicate to [Rhodes] that he would not be replaced" and that Guiberson had done nothing calculated to force Rhodes to fail to file with the EEOC on time. 927 F.2d at 880, A7. The appellate court found these conclusions clearly erroneous "because [the magistrate] ignore[d] two statements *made to Rhodes*[11] on his severance report." 927 F.2d 880, A8 (emphasis added). The Fifth Circuit set forth its critique of the magistrate's findings as follows:

> The magistrate judge relied almost exclusively on the fact that Guiberson Oil did not explicitly tell Rhodes that it would not hire anyone else. But Guiberson Oil nevertheless indicated that Rhodes would not be replaced. On Rhodes' severance report, Guiberson Oil clearly stated (1) that Rhodes was being terminated because of a reduction in work force and (2) that it would

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[11]There is absolutely no evidence in the record that even suggests that Rhodes saw the severance report, identified in testimony as an internal document, before he obtained it in discovery during this litigation. Indeed, the document itself establishes that Rhodes did not see it. *See pp.* 22-25 *infra*.

> consider re-hiring Rhodes. Thus, Guiberson Oil by implication told Rhodes that he would not be replaced.

Id.

The Fifth Circuit found that the statements it concluded had been made to Rhodes were false for two reasons. First, the appellate panel found that because of Attaway's hiring two months after Rhodes was fired, "[t]here was no reduction in work force as far as Rhodes' position went." 927 F.2d at 881, A9. Second, the Court of Appeals considered Guiberson's emphasis at trial on the fact that Rhodes was selected for discharge because of relatively poor performance to be inconsistent with its explanation that he was terminated because of a reduction in force. *Id.* Based on these conclusions, the Court of Appeals held that Guiberson had "lulled Rhodes into not approaching the EEOC sooner", 927 F.2d at 880, A8, by "conceal[ing] the fact that it was going to replace Rhodes," and "misrepresent[ing] the facts. . . that he was being terminated because of a reduction in work force and that it would consider rehiring him." 927 F.2d at 882, A11-A12.

In order to prevent Guiberson from benefiting from these asserted misrepresentations, the Fifth Circuit found that Guiberson was estopped from asserting that the statute of limitations began to run before December 19, 1986, when Rhodes learned about Attaway. Implicitly placing on Guiberson the burden of showing that Rhodes' failure to file on time was not caused by Guiberson's conduct, the panel also concluded that the estoppel was not defeated by any "showing of lack of diligence in this case." 927 F.2d at 882, A12. Accordingly, the Court of Appeals reversed the judgment setting aside the verdict and remanded for a determination on damages.

REASONS FOR GRANTING THE WRIT

Summary of Argument

In *Irwin v. Veterans Administration*, ___ U.S. ___, 111 S. Ct. 453, 457 (1990), this Court recently stated that the federal courts extend equitable relief from statutory filing requirements "only sparingly." The holding below belies that statement.

The holding below deprives petitioner Guiberson of the benefits of the time limit carefully crafted by Congress because, the appellate panel found, Guiberson withheld from respondent the true reason for his discharge. The Fourth and Seventh Circuits have rejected this reasoning, recognizing that if employers are estopped from relying on the statute of limitations whenever they do not admit to violating the anti-discrimination laws, the statutory time limits will have little meaning. This Court should grant certiorari to bring the doctrine of equitable estoppel in the Fifth Circuit into line with that doctrine as applied in the Fifth Circuit's sister courts.

The difference between the Fifth Circuit and the Fourth and Seventh Circuits reflects what several courts of appeals have recognized as a general confusion in the law of equitable modification of statutory requirements. In some circuits, estoppel is available only to a plaintiff who can show that the defendant deliberately sought to induce him not to assert his rights in a timely fashion. The court below did not require such proof. Respondent Rhodes asserted in the Court of Appeals that his claim was for equitable tolling, not equitable estoppel, because he had made no such showing.

Rhodes claimed to be entitled to the benefits of equitable tolling because, in his view, the facts necessary to establish petitioner's liability did not even exist until after he had been discharged and the statute had begun to run. Even if such a showing establishes the basis for tolling, and Guiberson submits that it does not and should not, other circuits have recognized a

presumption that where a plaintiff has all the facts he needs before the statute has run, he should be required to file in time. The Fifth Circuit did not even consider the significance of the undisputed fact that Rhodes knew everything he claims he needed to know to file his charge with almost two-thirds of the statutory time period still remaining. Whether the applicable doctrine is estoppel or tolling, the Fifth Circuit's requirement that Guiberson show Rhodes' lack of diligence, rather than placing on Rhodes the burden to show that he could not have filed on time, is literally unprecedented.

Although this Court has stated in *Irwin* its view that equitable modification should be rarely applied and has once in the last ten years summarily reversed an exceptionally unwarranted holding that a statute had been tolled, *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984) (per curiam), it has never addressed the confusion and differences among the lower courts. Uniform application of the statutes enacted by Congress requires that the federal courts apply common standards when they decide whether statutory requirements should be set aside on equitable grounds. This Court should grant review of the holding below in order to bring order and uniformity to the doctrine of equitable modification.

Finally, this Court should review the holding below because the Fifth Circuit's application of the standard of review "so far depart[s] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1(a). The Fifth Circuit's analysis of the record overlooks a fundamental principle that no experienced factfinder would ignore: a party cannot claim to have relied on a document that he cannot prove he ever saw before he filed his suit. The Fifth Circuit's factfinding also imports into the process of reducing the size of a work force a set of expectations and requirements that have no basis in the record, common sense, or the law. Unless this Court intervenes to correct such egregious abuses of appellate review, its admonitions that the Courts of Appeals must respect the strictures of Rule 52(a) will mean little.

I. This Court Should Grant Review In Order To Correct The Fifth Circuit's Application Of The Doctrine Of Equitable Estoppel And To Resolve The Conflicts And Confusion Among The Circuits As To The Scope And Requirements Of The Doctrines Of Equitable Modification

A. The Fifth Circuit's holding that an employer's assertion of a non-discriminatory reason for a termination estops it from relying on the statute of limitations conflicts with holdings in other circuits and effectively negates the statute of limitations.

The ruling below holds that Guiberson cannot rely on the statute of limitations, fixed by Congress at 180 days from the date Rhodes learned of his discharge,[12] because Guiberson misled Rhodes about the reasons for his termination. 927 F.2d at 881, A9. In the Fifth Circuit, therefore, an employer cannot rely on the statute of limitations unless it has told a fired employee that its own actions are illegal.

The Fourth and Seventh Circuits have flatly rejected the argument accepted by the Fifth Circuit.[13] As the Fourth Circuit recently explained,

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[12]29 U.S.C. § 626(d)(1) requires filing of a charge with the EEOC "within 180 days after the alleged unlawful practice occurred." 29 U.S.C § 623(a)(1) (West 1985) makes it an unlawful practice to discharge an individual because of age. As both courts below held, this Court's precedents leave no doubt that the 180-day period began to run when Guiberson notified Rhodes of his termination. *See Chardon v. Fernandez*, 454 U.S. 6 (1981) (per curiam); *Delaware State College v. Ricks*, 449 U.S. 250 (1980).

[13]The Third Circuit appears to lean toward the position adopted by the Fifth Circuit in this case. *See Meyer v. Riegel Products Corp.*, 720 F.2d 303 (3d Cir. 1983), *cert. dismissed*, 465 U.S. 1091 (1984).

> [T]his contention amounts to little more than a claim that the company's proffered reasons for its adverse employment action were pretextual. The fact that a company's explanation might be disputable for purposes of summary judgment on the underlying discrimination claim is not dispositive of the limitations issue, however. **If equitable tolling applied every time an employer advanced a non-discriminatory reason for its employment decisions, it would be "tantamount to asserting that an employer is equitably estopped whenever it does not disclose a violation of the statute." [citation omitted]. If this were the case, the 180-day period for filing a charge would have little meaning.**

Olson v. Mobil Oil Corp., 904 F.2d 198, 203 (4th Cir. 1990) (emphasis added).

The Seventh Circuit's reasoning is identical to the Fourth Circuit's:

> [Plaintiff] tries to bring himself within the doctrine by contending that the reorganization of the creative services department was a ruse to conceal the plan to fire him because of his age. This merges the substantive wrong with the tolling doctrine, ignoring our earlier distinction between two types of fraud. It implies that a defendant is guilty of fraudulent concealment unless it tells the plaintiff, "We're firing you because of your age." **It would eliminate the statute of limitations in age discrimination cases.**

Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990), *cert. denied*, ___ U.S. ___, 59 U.S.L.W. 3866 (1991) (1991 U.S. LEXIS 3858) (emphasis added).

Guiberson submits that the Fourth and Seventh Circuits are correct and the ruling below is wrong. Congress balanced the interests of employers and employees when it crafted the limitations period of the ADEA, and Congress deliberately decided to start that period at the time of the discriminatory act. A rule that suspends the statute of limitations whenever an employer asserts a legal reason for an action and the employee lacks knowledge of all the facts needed to disprove that assertion renders meaningless Congress' choice. *Cf. United States v. Kubrick*, 444 U.S. 111, 122 (1979) (Statute of limitations in malpractice action begins to run when patient knows he has been injured by medical treatment, even though he does not learn until later that treatment was negligent.)

Moreover, the rule adopted below fails to give proper weight to the reasons for the decision Congress made. Congress requires employees to file a complaint with the EEOC within a relatively short time in order to facilitate the EEOC's role as a conciliator and mediator. *Kale v. Combined Insurance Co.*, 861 F.2d 746, 753 (1st Cir. 1988). Early filing with the EEOC also provides the employee with assistance in discovering the facts pertaining to his situation. *See Olson v. Mobil Oil Corp., supra*, 904 F.2d at 203. There is no reason for an employee in Rhodes' position not to file, because doing so can never harm him.[14]

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[14]The filing period at issue, after all, pertains to the filing of a complaint with the EEOC, not to the filing of a lawsuit subject to the strictures of Rule 11. There is no requirement that an employee be in possession of facts sufficient to make out a prima facie case of discrimination in order to lodge a charge with the EEOC. *See Equal Employment Opportunity Comm'n v. Shell Oil Co.*, 466 U.S. 54, 68 (1984); 29 C.F.R. §§ 1626.6, 1626.8 (1990). Moreover, at the time of his discharge, Rhodes possessed almost all of the information with which he ultimately went to trial. He knew his own age; he knew there had been dissatisfaction with his productivity, Tr. 339; he had to

(Continued)

Congress made filing a charge with the EEOC easy and costless in order to encourage prompt resolution of employment disputes. Guiberson did not prevent Rhodes from filing by giving him misinformation about how to proceed, *cf. Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959) (employer estopped from relying on 3-year statute because it told employee he had 7 years in which to sue) or by inducing him to believe that he would be reinstated without a suit. *Compare Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584 (5th Cir. 1981) (en banc) (repeated promises to reinstate fired employee made to customer with knowledge they would be transmitted to employee support estoppel) *with Cerbone v. International Ladies' Garment Workers' Union*, 768 F.2d 45 (2d Cir. 1985) (vague promises of consideration for a position do not justify estoppel).[15] In these circumstances, equity has no reason to set aside the statutory requirements.[16]

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know that his duties would be assumed by someone else, since Guiberson would want to keep his customers; he knew that he thought himself capable of performing well; and he knew his own salary and that he was highly paid. In his closing to the jury, Rhodes' attorney argued that Rhodes' termination "was an effort to get rid of an older man for savings because of his age and age is related to his salary because he had been there so long doing a good job." Tr. 637; *id.* at 643 ("you will find that Calvin's age–and his age was related to his salary–was a factor in his termination.") Rhodes unquestionably possessed all of the information needed to make this claim on October 15, 1986 when he was told he was being discharged.

[15]Although the court below incorrectly found that Guiberson had indicated to Rhodes that he might be re-hired, *see* 927 F.2d at 881-82, A8-A10; pp. 22-25 *infra*, there is no finding or suggestion that Rhodes had any expectation of resuming employment with Guiberson. Rhodes has never asserted a claim based on Guiberson's failure to re-hire him.

[16]Simply preserving Rhodes' claim is an insufficient basis for setting aside the congressional scheme.

> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague

(Continued)

B. The federal law of equitable modification of statutory time limits is in disarray in the lower courts and requires clarification by this Court.

Despite Rhodes' vigorous protestations to the Fifth Circuit that his claim involved equitable tolling, not equitable estoppel, *see* n.9 *supra*, the court below concluded that he should be granted relief under the principles of estoppel rather than tolling. This unusual outcome reflects the fact that "the equitable exceptions to the charging period have been the subjects of some confusion." *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987), *cert denied*, 486 U.S. 1044 (1988). That confusion exists among the courts as well as among litigants. As the Seventh Circuit has observed, "Many cases, it is true, in the age discrimination field as in other areas, fuse the two doctrines, presumably inadvertently." *Cada v. Baxter Healthcare Corp., supra*, 920 F.2d at 452.

The disputes among the lower courts extend well beyond questions of doctrinal taxonomy; the Circuits apply different substantive standards when determining whether to enforce or override the procedural requirements enacted by Congress. Under the standards used in most Circuits, respondent would not have established an estoppel and would not prevail on his claim that the

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sympathy for particular litigants. As we stated in *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980), "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

Baldwin County Welcome Center v. Brown, 466 U.S. 147, 152 (1984). *See also Olson v. Mobil Oil Corp., supra*, 904 F.2d at 201 ("Over time, strict judicial adherence to limitations provisions may benefit plaintiffs because they will be encouraged to file timely claims rather than to rely on the application of uncertain exceptions which may be unevenly or arbitrarily administered.")

statutory period should be tolled. The issues relevant to the result in this case on which the federal courts apply different standards include the following:

1. Whether proponents of estoppel must show that the defendant intentionally sought to delay the filing of a charge or merely that the defendant denied violating the law? In most Circuits, estoppel depends on a showing that the defendant took some action with actual or constructive intent to prevent the plaintiff from filing in time. *See, e.g., Kale v. Combined Insurance Co., supra*, 861 F.2d at 752 (1st Cir. 1988) (requiring evidence of improper purpose or constructive knowledge of deceptive nature of conduct that prevents timely filing); *Dillman v. Combustion Engineering, Inc.*, 784 F.2d 57, 61 (2d Cir. 1986) (requiring "bad faith, dilatory actions"); *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (requiring actual or constructive design by employer to cause delay); *Cada v. Baxter Healthcare Corp., supra*, 920 F.2d at 451 (7th Cir.) (requiring "active steps to prevent the plaintiff from suing in time"); *Kriegesmann v. Barry-Wehmiller Co.*, 739 F.2d 357, 359 (8th Cir.), *cert. denied*, 469 U.S. 1036 (1984) (requiring deliberate conduct to lull plaintiff into delaying filing); *Kazanzas v. Walt Disney World Co.*, 704 F.2d 1527, 1532, *cert. denied*, 464 U.S. 982 (1983) (requiring conduct or representations intended to obtain delay).

In these courts, a plaintiff claiming estoppel must show that the defendant actively sought to prevent him from asserting his rights. As the holdings in the cited cases and the examples referred to in those cases illustrate, that showing cannot be made in the absence of efforts by the defendant to mislead the plaintiff about how to assert a claim or contacts with the plaintiff that suggest that the dispute will be resolved without a filing. The court below did not require Rhodes to make either showing, or to present proof of any other "efforts by [Guiberson] – above and beyond the wrongdoing upon which [Rhode's] claim is founded – to prevent

[Rhodes] from suing in time." *Cada v. Baxter Healthcare Corp., supra*, 920 F.2d at 451.

2. Whether equitable tolling applies whenever potential plaintiffs do not possess all of the facts needed to win a suit or only when their ignorance results from the defendant's extraordinary actions? In the court below, Rhodes argued that although he claimed that Guiberson violated the ADEA by discharging him because of his age, he had no cause of action until Guiberson hired Attaway two months after Rhodes had been terminated. *See* p.7 & n.10 *supra*. For that reason, Rhodes contended that the filing period should have been tolled for the period between his termination and the time he learned of Attaway's hiring, or at least for the period between his termination and the date Attaway was hired. In Rhodes' view, the claim that his discriminatory discharge did not become discriminatory until months later necessarily entitled him to bring that claim in more than the 180 days from the date of discharge allowed by Congress.

Many Circuits would flatly reject this argument. They hold that equitable tolling, like estoppel, depends on a showing that the employer's wrongful acts, other than the alleged discrimination itself, justify equitable modification of the statute. In the words of the Second Circuit, tolling is available to a plaintiff who can show that he was prevented by "extraordinary" actions by his employer from learning that the discharge was discriminatory. *See, e.g., Dillman v. Combustion Engineering, Inc., supra*, 784 F.2d at 60; *Cerbone v. International Ladies' Garment Workers' Union, supra*, 768 F.2d at 49; *Miller v. International Telephone & Telegraph Corp.*, 755 F.2d 20, 24 (2d Cir.), *cert. denied*, 474 U.S. 851 (1985). The Fourth Circuit agrees that equitable tolling requires evidence that the defendant deliberately misled the plaintiff:

> Equitable tolling applies where the defendant has wrongfully deceived or misled the plaintiff **in order to conceal the existence of a cause of action**. [citations omitted] To invoke

> equitable tolling, the plaintiff must therefore show that the defendant attempted to mislead him and that the plaintiff reasonably relied on the misrepresentation by neglecting to file a timely charge.

English v. Pabst Brewing Co., supra, 828 F.2d at 1049 (emphasis added). *See Hamilton v. 1st Source Bank*, 928 F.2d 86, 87 (4th Cir. 1990) (en banc) (tolling applies "under certain compelling circumstances") (dictum); *Olson v. Mobil Oil Corp., supra*, 904 F.2d at 201 (tolling "a narrow limitations exception" that "has the potential of becoming the exception that swallows up the congressional rule" unless applied sparingly). *See also, e.g., Kale v. Combined Insurance Co., supra*, 861 F.2d at 752 (1st Cir.) (tolling and estoppel related doctrines requiring employer misconduct to modify ADEA filing limit).

Rhodes did not attempt to show that Guiberson "deceived or misled [him] **in order to conceal the existence of a cause of action.**"[17] *English v. Pabst Brewing Co., supra.* Instead, he argued that the statute should be tolled because his cause of action did not even exist until some time after the statute started running. Rhodes Br. 4; Rhodes Repl. Br. 3. This theory is a direct attack on the congressional balancing of interests that led to a relatively short statute of limitations keyed to the date of the discriminatory act rather than to the accrual of a claim or the discovery of injury.[18] In the

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[17]Such evidence might consist, for example, of a showing that Guiberson intended to replace Rhodes with Attaway at the time it fired Rhodes but delayed Attaway's starting date to avoid a claim by Rhodes. The facts are that Attaway did not even submit his resume until approximately a month after Rhodes had been told of his discharge. P. 5 *supra*.

[18]*Cf. Hamilton v. 1st Source Bank, supra*, 928 F.2d 86 (4th Circuit, en banc, rejects claim that ADEA filing period begins running with discovery in discriminatory pay claim, overriding panel holding based on fact that pay of others not disclosed to plaintiff). *But cf. Colgan v. Fisher Scientific Co.*, ___ F.2d ___, 56 Fair Empl. Prac. Cas. (BNA) 106 (3d Cir. 1991) (en banc) (1991

(Continued)

Second and Fourth Circuits, Rhodes' claim would properly be rejected.

In the Seventh Circuit, on the other hand, Rhodes' tolling claim might do better. The Seventh Circuit rejects the view, held by the Second and Fourth Circuits, that tolling requires a showing of bad conduct by the defendant directed at concealing the cause of action. *See Cada v. Baxter Healthcare Corp., supra*, 920 F.2d at 452 (criticizing *Cerbone v. International Ladies' Garment Workers' Union, supra.*) In the Seventh Circuit, a cause of action that springs into being and makes an employment practice that has already occurred discriminatory in retrospect justifies tolling to "give[] a plaintiff the time he needs to discover whether the discrimination or other wrong done to him will in fact support a lawsuit." *Davidson v. Board of Governors*, 920 F.2d 441, 445 (7th Cir. 1990).[19]

3. Whether plaintiffs who discover all of the necessary information with sufficient time remaining in the statutory period in which to file are nonetheless entitled to an extended filing period? Even in the Seventh Circuit, however, Rhodes would not prevail on the facts of his claim. For in the Seventh Circuit, "[w]hen as here the necessary information is gathered after the claim arose but before the statute of limitations has run, **the presumption should be that the plaintiff could bring suit within the statutory period and should have done so.**" *Cada v. Baxter Healthcare Corp., supra*, 920 F.2d at 453 (emphasis added). The *Cada* court, therefore,

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U.S. App. LEXIS 12676) (en banc court holds that ADEA statutory period runs from date of the unlawful employment practice only if the practice inflicted harm which was or should have been noticed).

[19]The *Davidson* opinion pays lip service to Congress by concluding that the cause of action in these circumstances "accrues" on the date of the discriminatory practice, but that the running of the statute is then tolled. 920 F.2d at 445.

rejected the contention that "equitable tolling should bring about an automatic extension of the statute of limitations by the length of the tolling period or any other definite term." *Id.* at 452.

In this case, Rhodes learned that Attaway had been hired - the vital piece of information Rhodes claims he needed - with almost two-thirds of the statutory period left to run. Rhodes has never explained why he could not and did not file during that remaining 115 days.[20] More importantly, for the purposes of this petition for certiorari, the Fifth Circuit never required Rhodes to explain. Instead, it reversed the presumption followed by the Seventh Circuit and held that Rhodes should prevail because Guiberson had not established Rhodes' lack of diligence.[21] 927 F.2d at 882, A12.

* * * *

Eight years ago, the Third Circuit observed that "[t]he case law pertaining to equitable tolling has proliferated rapidly in the past few years." *Meyer v. Riegel Products Corp.*, 720 F.2d 303, 307 (3d Cir. 1983), *cert. dismissed*, 465 U.S. 1091 (1984). That wild

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[20]The most obvious explanation is that Rhodes made a mistake of law. He filed his charge 179 days after October 31, 1986, his last day of work. On the handwritten EEOC intake questionnaire he filled out on April 28, 1987, he responded "Nov. 1, 1986" to the question "What was the most recent date the harm you alleged took place?" Jt. Ex. 1, p. 31.

[21]The courts generally hold that reasonable reliance or diligence is an element of the case of the party seeking to establish estoppel or tolling. *E.g., Kale v. Combined Insurance Co., supra,* 861 F.2d at 756 (1st Cir.); *Felty v. Graves-Humphreys Co., supra,* 818 F.2d at 1128 (4th Cir.); *Ewald v. Great Atlantic & Pacific Tea Co.*, 620 F.2d 1183, 1188 (6th Cir.), *vacated on other grounds*, 449 U.S. 914 (1980); *Naton v. Bank of California*, 649 F.2d 691, 696 (9th Cir. 1981). The holding below apparently abandons that view. The opinion below cannot be read to hold that Rhodes bore his burden of proof since the district court explicitly made no findings on that issue, A15, and the Court of Appeals cannot "engage in such factfinding." *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

growth has continued in the interim, with little intervention from this Court to guide it. The result has been the development of divergent understandings of when it is appropriate for a court to use its equitable powers to set aside the procedural requirements Congress intended to be applied uniformly throughout the nation.

The holding below, which adopts a theory of equitable estoppel explicitly rejected by other Circuits and which sets aside the statutory filing period in circumstances that would not satisfy the criteria for equitable modification followed by other courts, illustrates this divergence. Guiberson respectfully submits that this Court should review the holding below in order to correct the analysis adopted by the Fifth Circuit and to bring uniformity to the federal doctrines of equitable modification.

II. This Court Should Grant Review To Correct The Fifth Circuit's Abuse Of Its Role As An Appellate Court

A. The Fifth Circuit's holding that the trial court's central findings of fact were clearly erroneous results from an improper and blatantly mistaken venture by the appellate court into the realm of the finder of facts.

The magistrate, sitting as the finder of fact at the trial level, concluded based on her review of the testimony that Guiberson had not told Rhodes he would not be replaced or that someone new would not be hired in a sales position. Based on this finding of fact, the magistrate concluded that Rhodes had not shown that Guiberson had done anything to prevent Rhodes from making a timely filing with the EEOC. *See* p. 6 *supra*.

A Court of Appeals reviewing a trial court's findings of fact under Rule 52(a) of the Federal Rules of Civil Procedure cannot overturn those findings when "the district court's account of the evidence is plausible in light of the record viewed in its entirety...."

Amadeo v. Zant, 486 U.S. 214, 223 (1988). The deferential posture required of an appellate court by Rule 52(a) applies whether the trial court's findings are based on testimonial or documentary evidence, although even greater deference is owed to a factfinder's determinations of witness credibility. *Anderson v. Bessemer City*, 470 U.S. 564, 573-75 (1985).

In light of this Court's clear holdings governing the scope of review, the court below could not challenge the magistrate's evaluation of the testimony she heard. Instead, the Fifth Circuit rested its reversal of the magistrate's key findings of fact on the contents of a document that the appellate panel thought the trial court had unaccountably ignored. 927 F.2d at 880, A8. According to the Court of Appeals, Guiberson "told" Rhodes on his "severance report"[22] that he would not be replaced and might be reinstated. 927 F.2d at 880-882, A8-A11. Based on this documentary evidence, the panel concluded that the magistrate had committed clear error. 927 F.2d at 880, A8.

Rhodes did not argue to the Fifth Circuit that the "severance report" proved the magistrate's findings wrong. Indeed, Rhodes did not mention that document in his main brief, and he mentioned it in reply only to illustrate the reasonableness of his alleged belief that he might be re-hired.[23] Thus, in seizing on the "severance report" to overturn the magistrate's findings, the Court of Appeals, acting as a finder of fact, placed great weight on a piece of evidence that neither the plaintiff nor the trial court considered particularly important.

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[22]The report, titled "Personnel Status Report", was introduced as Plaintiff's Exhibit 1. It is reprinted at pp. A22-A25 of the Appendix. The original form consists of a single page. It has been divided vertically into four pages in order to comply with this Court's typographical requirements.

[23]The only reference to the "severance report" in Rhodes' reply brief occurs at pp. 8-9 and reads as follows:

(Continued)

The Court of Appeals was wrong. The participants in the trial assigned little significance to the "severance report" for one fundamental reason: **there was no evidence that plaintiff ever saw that report before he filed this lawsuit**. Plaintiff testified only that at the time of his testimony, he had seen the report. Tr. 318. Moreover, it is clear from the face of the report, which was characterized in testimony as an internal document,[24] that Rhodes did not see it at the time he was fired or at any time before he belatedly filed his charge with the EEOC. Rhodes was told of his termination on October 15, 1986, Tr. 339-40, and there was no evidence that he had any later communication concerning the reasons for his discharge with anyone at Guiberson. The report, however, was dated October 22 and the last signature of approval on it was dated October 27.

Obviously, Rhodes could not have relied on or been misled by a document he never saw. *Cf. Ewald v. Great Atlantic & Pacific Tea Co., supra*, 620 F.2d at 1189 (plaintiff cannot have relied on letter received 14 months after termination as reason for failure to give notice of claim within 300 days of termination). Equally obviously, nothing in the report can be found to be "statements made to Rhodes", 927 F.2d at 880, A7-A8, in the absence of evidence that Rhodes received or saw the report.

Thus, the inexperienced factfinders on the Court of Appeals, *Anderson v. Bessemer City, supra*, 470 U.S. at 574-75,

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A reasonable man could believe that once reduced-in-force (laid off) because of economic conditions, and once the conditions of the economy strengthen, he may be considered for rehiring, just as the appellee had checked off on appellant's termination sheets. (Therefore, appellee must stand for the same proposition and belief.)

[24]Tr. 264. The distribution listed at the bottom of the report does not indicate that a copy is to go to the employee. A25.

made a fundamental mistake when they went off on their own in search of evidence with which to override the trial court's considered findings of fact. Rule 52(a) and this Court's admonitions to respect the letter, spirit, and purpose of that Rule are intended to prevent just such appellate incursions into the function of the finder of fact. This Court should review and reverse the Fifth Circuit's clearly erroneous and unarguably incorrect deviation from its role as a Court of Appeals.

B. The panel's factual assumption that consideration of merit is inconsistent with termination because of a need to reduce the size of the work force has no basis in the record, common sense, or the law.

The court below found a fatal inconsistency between Guiberson's trial presentation, which focused on Rhodes' work performance, and Guiberson's statement to Rhodes that he was being discharged because of a reduction in force. 927 F.2d at 881, A9.[25] This false and unsupported premise should not be allowed to stand.

The testimony presented by Guiberson established that Dresser Industries and its divisions, like the oil field services

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[25] Although the Court of Appeals focused only on the "severance report" which was never communicated to Rhodes, Guiberson does not dispute that Snyder, Rhodes' supervisor, told Rhodes he was being let go because of a reduction in force. The "severance report" itself states as the reason for termination "ECONOMIC REDUCTION IN WORK FORCE (SEE ATTACHED MEMO)". A24 The "attached memo", dated October 22, 1986 like the "severance report" itself, clearly stated that Rhodes had been selected for termination because of his "substandard job performance". A26. Thus, if the Court of Appeals were correct that the statements on the "severance report" were made to Rhodes, he must also have been aware that he had been included in the reduction in force because of inadequate performance and could not have been misled by the "severance report" into thinking otherwise. The panel did not address this obvious weakness in its analysis of the facts.

industry in general, were forced by hard times to reduce their work force. When determining which employees should be let go in order to meet the required level of reduction in force, supervisors at Dresser attempted to identify their least productive employees. Rhodes was selected for discharge in the October, 1986 reduction in force because his performance was inadequate. Other employees of varying ages were discharged before, simultaneously with and after Rhodes as part of the same process of shrinking the size of the work force. *See* pp. 3-5 *supra*. Guiberson focused its trial testimony on Rhodes' poor performance both because there was no dispute about the economic circumstances at the time and to show that its reason for including Rhodes in the reduction in force had nothing to do with his age.

The court below found that "[Guiberson's] proffered reason for the termination [reduction in force] was conceded by its case as being completely misleading."[26] This conclusion baffles petitioner. Surely the Court of Appeals cannot mean that when a company is forced to accomplish its mission with fewer people, it cannot choose to keep its most effective employees and to discharge its least effective. But if that is not what the court below meant, what is the

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[26]The court preceded this statement with the conclusion that "[t]here was no reduction in work force as far as Rhodes' position went." 927 F.2d at 881, A9. But the record shows that one salesman (age 27) was fired in July, Rhodes was fired in October, along with a technical representative, and Snyder was fired in December. Attaway was hired, on a temporary basis, in December. *See* pp. 3-5 *supra*. Thus, the number of salesmen declined by a net of two, clearly a reduction in force. In a broader perspective, the record shows that from October 31, 1985 to April 1, 1987, Dresser Industries reduced its work force by approximately 7,500 employees. During that same period, the Atlas Division of Dresser, of which the Compac operation was a part until after Rhodes' termination, *see* p. 4 *supra*, terminated approximately 1,600 employees. Tr. 600. The appellate conclusion that there was no reduction in force ignores all of these facts of record.

contradiction between Guiberson's evidence and its statements that the Fifth Circuit found so troublesome?[27]

Nothing in the record of this case suggests that the procedure followed by Guiberson is inconsistent with the general practice of all employers faced with the need to reduce their payrolls and not bound by contract or statute to apply a selection criterion other than merit. The unfounded assumption to the contrary on which the decision below relies cannot sustain the panel's holding that the trial court's finding was clearly erroneous. *See Amadeo v. Zant, supra,* 486 U.S. at 224. And to the extent that the panel's assumption constitutes a statement of law, its view must be rejected as a bizarre application of a statute with a stated purpose of "promot[ing] employment of older persons based on their ability rather than age." 29 U.S.C. § 621(b) (West 1985).

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[27]To the extent that the conclusion reached by the Court of Appeals reflects an evaluation of the credibility of Guiberson's witnesses, all of whom testified that Rhodes was laid off as part of a reduction in force, the decision below flouts this Court's guidance in *Anderson v. Bessemer City, supra,* 470 U.S. at 575. In light of the evidence recited in text and in the preceding footnote, the trial court had more than ample basis for crediting the testimony that there was indeed a reduction in force that involved Rhodes.

CONCLUSION

For the reasons stated above, this Court should grant its Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,

Petitioner, GUIBERSON OIL TOOLS DIVISION OF DRESSER INDUSTRIES, INC.

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APPENDIX

CONTENTS OF APPENDIX

CALVIN RHODES,
Plaintiff-Appellant,

v.

GUIBERSON OIL TOOLS DIVISION
a/k/a F I E, a/k/a Division
Dresser Industries, Inc.,
Defendant-Appellee.

No. 90-3178

United States Court of Appeals,
Fifth Circuit.

April 3, 1991

Appeal from the United States District Court for the Eastern District of Louisiana.

Before: POLITZ, WILLIAMS, and JONES, *Circuit Judges.*

JERRE S. WILLIAMS, *Circuit Judge:*

Plaintiff-appellant Calvin Rhodes sued defendant-appellee Guiberson Oil Tools Division on the ground that Guiberson Oil violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1988), (ADEA) when it discharged him. The jury found that Guiberson Oil discriminated against Rhodes on the basis of his age. The magistrate judge, who was to decide all issues except liability, then ruled that Rhodes had failed to file his charge with the Equal Employment Opportunity Commission in a timely fashion. On this basis, the magistrate judge dismissed Rhodes' case with prejudice.

I. FACTS AND PRIOR PROCEEDINGS

On October 15, 1986, Calvin Rhodes received notice that he would be discharged from his job with Guiberson Oil Tools Division because of a reduction in work force. The reason for his

termination seemed credible to Rhodes. He worked in the oil field industry, which was suffering a deep recession in 1986. His last day on the job was October 31, 1986. At that time, Rhodes was 56 years old and made $65,000. On his severance report, Guiberson Oil indicated that Rhodes was discharged because of a reduction in work force and that it would consider re-hiring Rhodes. On or about December 19, 1986, Rhodes discovered that four days earlier, Guiberson Oil had hired a 42-year-old at $36,000 to replace him. On April 28, 1987, Rhodes filed a charge with the Equal Employment Opportunity Commission (EEOC), 195 days after he received notice of his termination. Assuming that the 180 day limit for his charge began running on the date of his discharge, the filing was 15 days late. Rhodes told the EEOC on June 21, 1988, that he would pursue his discrimination claim in federal court. On this basis, the EEOC dismissed Rhodes' EEOC charge.

On August 10, 1988, he filed a federal suit under the Age Discrimination in Employment Act. The parties agreed that the jury would decide the issue of liability and the magistrate judge would decide the remaining issues. The jury found that Guiberson Oil had terminated Rhodes because of his age, although it had not done so "willfully"[1] . The magistrate judge then held a hearing on the issue of damages and accepted post-trial memoranda on the issues of damages and timeliness. The magistrate judge found that the period for filing a claim with the EEOC had expired before Rhodes filed his charge with the EEOC and the period could not be extended under

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[1]The text of the jury instruction on "willfully" was:

> Such discrimination is willful if the defendant knew that its discriminatory conduct was prohibited by law or showed a reckless disregard of whether or not its discriminatory conduct was prohibited by law.

Neither the magistrate judge nor the parties have raised any issue that the jury finding of lack of willfulness had any effect on whether the statements made by the company at the time of Rhodes' discharge were misleading or false.

equitable tolling or equitable estoppel. The magistrate judge dismissed Rhodes' suit with prejudice. Rhodes appeals, contending that his suit is not time-barred. The sufficiency of the evidence supporting the jury verdict is not before us. Guiberson Oil did not raise this issue in its brief or at oral argument.

II. PRE-CONDITIONS TO AN ADEA SUIT

Employees cannot commence a civil action under the ADEA until 60 days after they have filed a charge with the EEOC alleging unlawful discharge. 29 U.S.C. § 626(d) (1988). ADEA required that Rhodes file such a charge within 180 days of the alleged discriminatory act. *Id.* at § 626(d)(1). Rhodes was not entitled to the 300-day filing period applicable to plaintiffs in deferral states. Louisiana has no state agency for age discrimination complaints and is therefore not a deferral state. *See Id.* §§ 633(b), 626(d)(2); La.Rev.Stat.Ann §§ 23:971-76 (West 1985); *see generally Blumberg v. HCA Management, Co.*, 848 F.2d 642, 646 (5th Cir. 1988), *cert. denied*, 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed.2d 781 (1989); *Mennor v. The Fort Hood Nat'l Bank*, 829 F.2d 553, 554-56 (5th Cir. 1987). The statute provides that the 180-day filing period begins when the employee receives notice of discharge. *See generally Chardon v. Fernandez*, 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981) (per curiam); *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980). According to this rule, the filing period for Rhodes began October 15, 1986, the date he received notice of his termination, and ended fifteen days before he filed his complaint with the EEOC.

III. EQUITABLE TOLLING AND EQUITABLE ESTOPPEL

Even though Rhodes did not file his complaint with the EEOC within 180 days of the notice of his termination, his federal suit is not necessarily time-barred. The EEOC filing requirement

functions as a statute of limitations rather than a jurisdictional prerequisite. It is "a pre-condition to filing suit in district court, but is not related to the subject matter jurisdiction of the court." *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 595 (5th Cir. 1981) (en banc); *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398, 102 S.Ct. 1127, 1135, 71 L.Ed.2d 234 (1982). The filing deadline is thus subject to equitable modification, i.e. tolling or estoppel, when necessary to effect the remedial purpose of ADEA. *Clark v. Resistoflex Co., A Div. of Unidynamics Corp.*, 854 F.2d 762, 765 (5th Cir. 1988).

The Fourth Circuit recently explained the difference between equitable tolling and equitable estoppel: "Equitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act. Equitable estoppel, in contrast, examines the defendant's conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights." *Felty v. Graves-Humphreys Co.*, 785 F.2d 516, 519 (4th Cir. 1986)(footnote omitted)(quoted in *Clark v. Resistoflex Co., A Division of Unidynamics Corp.*, 854 F.2d 762, 769 n. 4 (5th Cir. 1988)). A case of equitable tolling would arise, for example, if the employer had failed to post information about employees' rights under federal anti-discrimination laws, *Clark*, 854 F.2d at 767, or if the employee "could not by the exercise of reasonable diligence have discovered essential information bearing on his claim." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1990). Equitable tolling focuses on the employee's ignorance, not on any possible misconduct by the employer.

Under equitable estoppel, an employer is estopped from asserting the filing period if the employer misrepresented or concealed "facts necessary to support a discrimination charge." *Pruet Prod. Co. v. Ayles*, 784 F.2d 1275, 1280 (5th Cir. 1986). If the defendant did conceal facts or misled the plaintiff and thereby caused the plaintiff not to assert his rights within the limitations period, the defendant is estopped from asserting the EEOC filing time as a defense. *See id; see also Coke v. General Adjustment*

Bureau, Inc., 640 F.2d 584, 595-96 (5th Cir. 1981)(en banc); *Oaxaca v. Roscoe*, 641 F.2d 386, 391 (5th Cir. Unit A April 1981); *Woodard v. Western Union Tel. Co.*, 650 F.2d 592, 595 (5th Cir. Unit B July 1981); *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 931 (5th Cir. 1975). Although this case touches on both doctrines, it focuses more on equitable estoppel rather than equitable tolling because Rhodes claims he was untimely because Guiberson Oil mislead [sic] him about the reasons for his discharge. *See Cada*, 920 F.2d at 451-52.

Rhodes has the burden of proving that Guiberson Oil is estopped from relying on the EEOC filing period. *Blumberg v. HCA Management Co.*, 848 F.2d 642, 644 (5th Cir. 1988), *cert. denied*, 488 U.S. 1007, 109 S.Ct. 789, 102, L.Ed.2d 781 (1989). Rhodes must prove that the defendant concealed facts or misled him about the reasons for his termination. The limitations period is then tolled until he knew or should have discovered the misrepresentation or concealment that caused him to delay filing his complaint. The magistrate judge held that Rhodes did not prove that he was entitled to equitable tolling or equitable estoppel. In so holding, she stated her fact findings in a written opinion.

IV. STANDARD OF REVIEW

We first set out the applicable standard of review. The case was submitted to the magistrate judge by consent of the parties under 28 U.S.C. § 636(c) (1988). The magistrate judge's rulings are directly appealable to the Court of Appeals, *id.* at § 636(c)(3), and they are reviewed under the same standard of review afforded rulings by a district judge. We must decide, therefore, what types of rulings the magistrate judge made and what standard of review applies to such rulings.

At the close of Rhodes' case-in-chief, Guiberson Oil made a motion for a directed verdict on the ground that Rhodes' EEOC charge was untimely. The magistrate judge reserved ruling on the

motion. After the jury found Guiberson Oil guilty of age discrimination, the magistrate judge found Rhodes' claim time barred and dismissed it with prejudice, "having considered the petition, the record, law, and written responses assigned."

Although Guiberson Oil made a motion for directed verdict on the issue of timeliness, we do not treat the magistrate judge's ruling as a directed verdict for two reasons. First, Guiberson Oil could not make a motion for directed verdict on the issue of timeliness because the magistrate judge was by agreement to decide timeliness, not the jury. No jury instructions on timeliness or questions regarding equitable estoppel or equitable tolling were submitted to the jury. *See generally In the Matter of Waller Creek, Ltd.*, 867 F.2d 228, 232 (5th Cir. 1989); *North Miss. Communications, Inc. v. Jones*, 792 F.2d 1330, 1333 (5th Cir. 1986). The parties had agreed that the jury would only decide liability. Guiberson Oil should have made a motion for involuntary dismissal under Rule 41(b) at the close of Rhodes' case-in-chief.

Second, the magistrate judge did not use the standard applicable to a motion for directed verdict. *See Boeing v. Shipman*, 411 F.2d 365, 370-73 (5th Cir. 1969) (en banc). Rather, the magistrate judge considered all evidence, made credibility judgments, and drew inferences unfavorable to Rhodes. Thus, we do not review the magistrate-judge's ruling under the more exacting directed verdict standard. Instead her factual findings are entitled to stand unless they are clearly erroneous as afforded by Rule 52(a) to findings of fact made by the bench.

V. TIMELINESS OF RHODES' EEOC CHARGE

The magistrate judge found that Guiberson Oil took no action to conceal facts or mislead Rhodes. She ruled that she

> has no reason to dispute the plaintiff's statement that he was unaware of the basis for an age

> discrimination claim until he learned of the hiring of someone younger than himself shortly before Christmas. However, there is simply no reason or basis to make the defendant responsible for his lack of knowledge. The ultimate question here is not whether the plaintiff lacked all operative facts with which to assess his position but whether or not the defendant did anything to conceal facts or mislead the plaintiff thereby causing him to rest on his claim. In this regard, the court has reviewed the plaintiff's trial testimony. In that trial testimony, he sets forth no actions on the part of defendant calculated to force him, or any other reasonable person in his situation, to fail to approach the E.E.O.C. sooner than he did. The defendant did not indicate to plaintiff that he would not be replaced; nor did it indicate to him that another person would not be hired in a sales position. This being the case, the undersigned believes that the plaintiff has not carried his burden of proof on the issue of the applicability of the doctrine of equitable estoppel.

After a careful review of the entire record, *see Rendon v. AT & T Technologies*, 883 F.2d 388, 392 (5th Cir. 1989), we are "left with the definite and firm conviction that a mistake has been committed" in the magistrate judge's factual findings on equitable estoppel. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); *see also Amadeo v. Zant*, 486 U.S. 214, 222-24, 108 S.Ct. 1771, 1777, 100 L.Ed.2d 249 (1988).

The magistrate judge made two primary fact findings: (1) "defendant did not indicate to plaintiff that he would not be replaced"; and (2) Rhodes "sets forth no actions on the part of the defendant calculated to force him, or any other reasonable person in his situation, to fail to approach the E.E.O.C. sooner than he did."

On the basis of these two facts, the magistrate judge held that Rhodes was not legally entitled to equitable estoppel.

We generally agreed with the magistrate judge that "the facts as related to this issue are now largely not in dispute." We must ultimately disagree with the magistrate judge's conclusion, however, because she ignores two statements made to Rhodes on his severance report. The magistrate judge relied almost exclusively on the fact that Guiberson Oil did not explicitly tell Rhodes that it would not hire anyone else. But Guiberson Oil nevertheless indicated that Rhodes would not be replaced. On Rhodes' severance report, Guiberson Oil clearly stated (1) that Rhodes was being terminated because of a reduction in work force and (2) that it would consider re-hiring Rhodes. Thus, Guiberson Oil by implication told Rhodes that he would not be replaced.

The record shows that the company's misstatements lulled Rhodes into not approaching the EEOC sooner. Rhodes did not have enough facts to be sufficiently aware of a possible claim and thus place an EEOC charge. He only knew that Guiberson Oil said it was reducing its work force, he would be terminated, and he was 56-years-old. He had no reason to suspect that the reason he was discharged was because of his age – as the jury later found – and thus that he should file a complaint with the EEOC. The oil industry was in a recession, and Guiberson Oil's proffered explanation seemed highly credible. Because of Guiberson Oil's representations to Rhodes, he was precluded from evaluating his legal options until he discovered that he had been misled by the misrepresentations. In this way, Guiberson Oil committed a wrong against Rhodes that induced Rhodes to refrain from exercising his rights.

We conclude, therefore, that the magistrate judge committed clear error in finding that Guiberson Oil "did not indicate to plaintiff that he would not be replaced and that no actions on the part of defendant (were) calculated to force him, or any other reasonable person in his situation, to fail to approach the EEOC sooner than he did." Instead the facts clearly demonstrated at trial that Guiberson

Oil concealed facts and misled Rhodes. The statements on Rhodes' severance report were revealed to have been false. There was no reduction in work force as far as Rhodes' position went. The position was not eliminated or combined with another position. Instead, Guiberson Oil hired an employee not within the protected age group at a lower salary for Rhodes' former position. At trial, Guiberson Oil's defense did not even focus on the issue of a reduction in work force. Guiberson Oil's defense was that Rhodes was discharged because of his poor work performance, and it had no intention of re-hiring Rhodes. Thus, its proffered reason for the termination was conceded by its case as being completely misleading.

Guiberson Oil should not be able to take advantage of its misstatements. We review the applicability of equitable estoppel to the facts of this case de novo as a question of law. We hold that equitable estoppel should apply. The filing period was tolled under equitable estoppel until Rhodes discovered the falsity of Guiberson Oil's statements, on or about December 19, 1986.

This case is closely akin to *Coke* and *Reeb* (previously cited). In *Coke*, 640 F.2d at 595, we ruled en banc that the district court should not have awarded the defendant summary judgment on the ground that plaintiff's EEOC charge was untimely. Drawing reasonable inferences from affidavits in favor of the plaintiff, we noted that the defendant misrepresented its intention to reinstate plaintiff to one of defendant's customers (who wanted plaintiff reinstated), the defendant knew or should have known that the customer would convey this misrepresentation to the plaintiff, and that plaintiff reasonably relied on the misrepresentation in not filing his ADEA claim in a timely fashion. We held that these facts, if proved, would suffice to prove equitable estoppel.

The facts in *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d at 931, are even more analogous to this case. Claimant was falsely told that his job was terminated because of inadequate funds. This false claim differs virtually not at all from the claim that

a reduction in work force was the cause. The misrepresentation actively lulled Reeb into missing the EEOC filing deadline. We tolled the filing period until the time when Reeb became aware of the facts necessary to support a discrimination charge.

Coke and *Reeb* together control Rhodes' claim. Here the defendant was told on his severance report that he might be reinstated, a misrepresentation similar to the one in *Coke*, and that he was being laid off because of a reduction in work force, a misrepresentation for all practical purposes identical to the one in *Reeb*. These misrepresentations, combined with the economic downturn in the oil industry, should have been found by the magistrate judge to have misled Rhodes from thinking that he was being discharged because of his age.

The Fifth Circuit cases upon which Guiberson Oil relies do not address the issue. In both of them the employee had sufficient facts to evaluate the possibility of age discrimination. In *Blumberg v. HCA Management Company*, 848 F.2d 642, 645 (5th Cir. 1988), *cert. denied*, 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed.2d 781 (1989), the plaintiff "was advised at the time of her termination that she was being discharged for cause, and she was able to evaluate the propriety of the reasons for her dismissal immediately." Rhodes, on the other hand, was told and therefore thought he was laid off because an actual economic downturn required a reduction in work force. Until he learned he was replaced by a younger man, he could not be expected to evaluate the "propriety of the reasons" for his dismissal because until then the excuse of reduction in work force seemed highly reasonable and because he did not have sufficient facts with which to approach the EEOC. Further, Guiberson Oil had told Rhodes that he was an employee worthy of being considered for re-hire. Rhodes had no reason, until discovery of Guiberson Oil's hiring of a replacement, to suspect that Guiberson Oil was guilty of age discrimination. In contrast the plaintiff, Blumberg, knew the company's asserted reason for discharge from the time of termination.

In *Pruet Production Company v. Ayles*, 784 F.2d 1275, 1280 (5th Cir. 1986), the plaintiff knew three facts that Rhodes did not: that he was fired for lack of ability, that he would be replaced, and that his replacement was outside the protected age group. The plaintiff clearly had the facts from the date of termination that should have enabled him to evaluate the discharge and suspect discrimination. Here Rhodes had no idea of the possibility of discrimination when he received notice of termination and did not discover such a possibility until almost two months later.

Guiberson Oil claims that its hiring of a replacement was irrelevant to Rhodes' filing of a claim. Even though the standard for filing a complaint with the EEOC is more lenient than that for a prima facie case, the fact that Guiberson Oil replaced Rhodes was still highly relevant for an employee in Rhodes' circumstances. Knowing that he was 56-years-old and would be discharged from his job was simply not enough to go to the EEOC and file a charge when Rhodes was told that he was being discharged because of a reduction in work force (a reasonable statement in light of the economic downturn in the Louisiana oil field industry). Further, it bears reemphasis that Guiberson Oil told Rhodes that he would be considered for re-hiring. *See Blumberg v. HCA Management, Co.*, 848 F.2d 642, 645 (5th Cir. 1988), *cert. denied*, 488 U.S. 1007, 109 S. Ct. 789, 102 L.Ed.2d 781 (1989) ("[A] plaintiff who is aware that she is being replaced in a position she believes she is able to handle by a person outside the protected age group knows enough to support filing a claim."); *Wilkerson v. Siegfried Ins. Agency, Inc.*, 621 F.2d 1042 (10th Cir. 1980).

VI. CONCLUSION

In sum, the magistrate judge was clearly erroneous in finding that Guiberson Oil did not conceal facts or mislead Rhodes. It concealed the fact that it was going to replace Rhodes and misrepresented the facts when it told Rhodes that he was being terminated because of a reduction in work force and that it would

consider rehiring him. The misrepresentations and concealment prejudiced Rhodes' awareness of the possibility of age discrimination. Guiberson Oil cannot properly assert the bar of the statutory filing period when it clearly misled Rhodes. The company is estopped from claiming that the limitations period began to run until Rhodes discovered the misrepresentations, on or about December 19, 1986.

This is not to say that all employees whose employers make misrepresentations about the reason for the employees' dismissal are entitled to equitable estoppel. As the Supreme Court noted: "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151, 104 S. Ct. 1723, 1726, 80 L.Ed.2d 196 (1984) (per curiam); *see also Cruce v. Brazusport Indep. School Dist.*; 703 F.2d 862, 864 (5th Cir. 1983) (per curiam) (same). There is no showing of lack of diligence in this case.

We REVERSE the decision of the magistrate judge setting aside the verdict of the jury and REMAND for a determination on damages and further proceedings consistent with this opinion.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CALVIN RHODES	:	CIVIL ACTION
VERSUS	:	NUMBER: 88-3485
GUIBERSON OIL TOOLS DIVISION OF DRESSER INDUSTRIES, INC.	:	SECTION: "H"(5)

ORDER AND REASONS

Presently before the court is the issue of whether or not the claim enunciated by Calvin Rhodes in this civil action pursuant to 29 U.S.C. § 626 is prescribed. The facts as related to this issue are now largely not in dispute and may be summarized as follows:

On or about October 15, 1986, the plaintiff, Calvin Rhodes, was notified that his employment with the defendant, Guiberson, would be terminated effective October 31, 1986. At this point in time, Calvin Rhodes was of the opinion that the defendant was undergoing a reduction in force and that, therefore, he was being terminated. October 31, 1986 was the last date of Rhodes' employment. On December 15, 1986 Guiberson hired Richard Attaway, age 42, in a similar sales position as that held by the plaintiff prior to his termination. Some time subsequent to Attaway's hire and prior to Christmas, 1986, plaintiff became aware that Attaway had been placed on defendant's payroll. Calvin Rhodes filed his complaint with the Equal Employment Opportunity Commission alleging age discrimination against the defendant Guiberson on April 28, 1987 one hundred ninety-five days subsequent to the date that he received notice of termination.

DATE OF ENTRY: FEB. 15, 1990

The sole questions to be determined herein are first, whether or not Calvin Rhodes filed a timely complaint with the Equal Employment Opportunity Commission to maintain a claim under the Age Discrimination in Employment Act. Secondly, if the claim filed by the plaintiff was not timely, is the statute under the specific facts of plaintiff's situation tolled for purposes of allowing his claim to, nevertheless, be appropriately before the court.

On the issue of whether or not the plaintiff's claim was timely filed before the Equal Employment Opportunity Commission, the court answers that question in the negative. The United States Supreme Court has made clear that, in determining whether a complaint is timely filed, the court is to focus "on the time of the discriminatory act not the point at which the consequences of the act become painful." *Chardon v. Fernandez*, 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981), citing *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L.Ed.2d 431 (1980). The two aforementioned cases make clear that the fact that a litigant was afforded reasonable notice before the actual termination of his job came about does not, in and of itself, extend the period within which suit may be filed. In the instant case, there is no reason or basis to find subsequent discriminatory acts beyond the date that Mr. Rhodes received his notice of termination and the court finds the statutory filing time commenced to run as of October 15, 1986. Therefore, the one hundred eighty day period during which time the charge before the E.E.O.C. should have been filed clearly expired before April 28, 1987 when Rhodes first memorialized his complaint to that agency.

The jurisprudence is, however, now clear that even if a charge is not timely filed before the E.E.O.C., this is not always fatal to the maintaining of a judicial action. Filing a complaint before the E.E.O.C. is not a jurisdictional prerequisite in the sense that dollar amount is a jurisdictional prerequisite in a diversity case. *Chappell v. Emco Machine Works Company*, 601 F.2d 1295 (5th Cir. 1979). Accordingly, the one hundred eighty day time period contained in the statute is subject to equitable delay and/or

interruption. The question then remains whether or not the plaintiff is entitled to appropriately invoke one of these concepts in order to prevent the death of his claim.

The jurisprudence has in limited fact situations found estoppel to be appropriate. First, it has been noted that the Supreme Court recognized the tolling of the statutory time period while a civil action was pending before a state court which had subject matter jurisdiction over the claims but was a forum of improper venue. *International Union of Electrical Workers v. Robbins & Meyers*, 429 U.S. 229, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976). Secondly, when it has been found that the E.E.O.C. itself misled a complainant about the nature of his rights under Title VII or under the Age Discrimination in Employment Act, the court has indicated that a complainant who relied on such erroneous statements will not be penalized. *Page v. U.S. Industries, Inc.*, 556 F.2d (5th Cir. 1977), *cert. denied*, 434 U.S. 1045, 98 S.Ct. 890, 54 L.Ed.2d 796 (1978). Lastly, the court has upheld the tolling of the one hundred eighty day period until the claimant knew or should have known the facts which would give rise to his claim. The reasoning behind this is to prevent a defendant from prospering by his concealment of facts that would allow the plaintiff to recognize a claim and then raise the statute of limitations in defense of his position. *Bickham v. Miller*, 584 F.2d 736 (5th Cir. 1978); *Reeb v. Economic Opportunity Atlantic, Inc.*, 516 F.2d 924 (5th Cir. 1975).

As the court is of the opinion that the first two bases for invoking equitable estoppel are not present in the instant case, there will only be further discussion as to the third possible basis, that being whether the defendant in any way misled the plaintiff or attempted to conceal its alleged discrimination from him. If there were evidence of either concealment of facts or misleading acts on the part of defendant, the court would then have to determine whether or not a person similarly situated as the plaintiff with a prudent regard for his rights would have discovered the discrimination in the absence of misleading statements or concealment on the part of the defendant. *Reeb, supra*, at p. 931.

On this issue, it is the plaintiff who bears the burden of proof that equitable estoppel is applicable to his fact situation. *Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338 (5th Cir. 1981); *Taylor v. General Telephone Company of South West*, 759 F.2d 437 (5th Cir. 1985).

In the instant case, the undersigned has no reason to dispute the plaintiff's statement that he was unaware of the basis for an age discrimination claim until he learned of the hiring of someone younger than himself shortly before Christmas. However, there is simply no reason or basis to make the defendant responsible for this lack of knowledge. The ultimate question here is not whether the plaintiff lacked all operative facts with which to assess his position but whether or not the defendant did anything to conceal facts or mislead the plaintiff thereby causing him to rest on his claim. In this regard, the court has reviewed the plaintiff's trial testimony. In that trial testimony, he sets forth no actions on the part of defendant calculated to force him, or any other reasonable person in his situation, to fail to approach the E.E.O.C. sooner than he did. The defendant did not indicate to plaintiff that he would not be replaced; nor did it indicate to him that another person would not be hired in a sales position. This being the case, the undersigned believes that the plaintiff has not carried his burden of proof on the issue of the applicability of the doctrine of equitable estoppel.

Lastly, the court considers the plaintiff's argument made for the first time post-trial, that defendant failed to post upon its premises information setting forth the employees' rights under the A.D.E.A. Admittedly, there is Fifth Circuit jurisprudence indicating that, when the employer has so neglected, equitable tolling may be applied to a plaintiff's claim. *Clark v. Resistoflex Co., Division of Unidyanamics*, 854 F.2d 762 (5th Cir. 1982). *Elliott v. Group Medical and Surgical Service*, 714 F.2d 556 (5th Cir. 1983); *Charlier v. S.C. Johnson and Son, Inc.*, 556 F.2d 761 (5th Cir. 1977). In this regard, the court has perused the plaintiff's trial testimony and notes that, at no point during his testimony on the liability phase of this litigation, did he suggest that he failed to recognize his rights under the law because the employer had failed to

post appropriate notices in the work place. As pointed out by defendant, this is not an issue raised in the pre-trial order and again the undersigned is of the opinion that the plaintiff has failed to establish his burden of proof in this area.

Accordingly, the court finds that the claim of plaintiff, Calvin Rhodes, against the defendant, Guiberson Oil Tools Division of Dresser Industries, Inc., is time barred and, therefore, his claim will be dismissed with prejudice.

New Orleans, Louisiana, this 13 day of February, 1990.

/s/
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CALVIN RHODES	:	CIVIL ACTION
VERSUS	:	NUMBER: 88-3485
GUIBERSON OIL TOOLS DIVISION OF DRESSER INDUSTRIES, INC.	:	SECTION: "H"(5)

JUDGMENT

The Court, having considered the petition, the record, the applicable law, and for the written reasons assigned,

IT IS ORDERED, ADJUDGED AND DECREED that the claim of plaintiff, Calvin Rhodes, against defendant, Guiberson Oil Tools Division of Dresser Industries, Inc., is time barred and, therefore, his claim will be DISMISSED WITH PREJUDICE.

New Orleans, Louisiana, this 13 day of February, 1990.

/s/
UNITED STATES MAGISTRATE

DATE OF ENTRY: FEB. 15, 1990

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-3178

D.C. Docket No. CA-88-3485-"H"(5)

CALVIN RHODES,

Plaintiff-Appellant,

versus

GUIBERSON OIL TOOLS DIVISION
a/k/a F I E a/k/a DIVISION
DRESSER INDUSTRIES, INC.

Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana

Before: POLITZ, WILLIAMS and JONES, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

April 3, 1991

ISSUED AS MANDATE: May 28, 1991

A true copy
Test
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/
Deputy
New Orleans, Louisiana 7/17/91

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-3178

CALVIN RHODES,
Plaintiff-Appellant,

versus

GUIBERSON OIL TOOLS DIVISION
a/k/a F I E a/k/a DIVISION
DRESSER INDUSTRIES, INC.
Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING

(May 15, 1991)

Before: POLITZ, WILLIAMS and JONES, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered case be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY
OF THE MANDATE.

	FOR ACCOUNTING USE ONLY	STATE	EMPLOYEE NUMBER	STATE W/H	ACCOUNT NUMBER	TAX CLASS	REQUEST DATE
							10-22-86

A CODE	PERSONNEL STATUS REPORT PM-128-P	STATUS ☐NEW ☐REHIRE ☒CHANGE (☒)TERMINATION ☐LEAVE OF ABSENCE	EFFECTIVE DATE 10-31-86
☐ SEX ☒M ☐F	EMPLOYEE (LAST-FIRST-MIDDLE) NAME RHODES, CALVIN F.	S.S.# 453-44-8672	☐ MARINE ☐ F.W.W. ☐NON- ☒ EXEMPT ☐ HOURLY EXEMPT	ACCOUNT NUMBER 6100-LB1C

GROUP	DIVISION	DEPARTMENT-AREA-REGION	DISTRICT-SECTION-PLANT	LOCATION-OPERATION
ASOG	ATLAS	COMPAC	NEW ORLEANS, LA	NEW ORLEANS, LA

B	CHECK ATTACHMENTS	JOB TITLE	SALARY RATE	GRADE
NEW	[Irrelevant Material Omitted]			

ADDRESS (INCLUDE ZIP CODE)	TELEPHONE NUMBER	DATE OF BIRTH

MAILING ADDRESS FOR PAYCHECK

JUSTIFICATION FOR EMPLOYMENT

JMN/27

HIRE SOURCE: ☐ HOUSTON ☐ FIELD ☐ OTHER

IMMEDIATE SUPERVISOR

☐ RECEIPT OF BENEFIT BROCHURE

NOTE: All new employees must be presented with and sign the receipt for Insurance Application Forms.

(EXHIBIT CONTINUED)

C	TYPE OF CHANGE	FROM				TO			
STATUS CHANGE	☐ ACCOUNT NO. ☐ PROMOTION ☐ RECLASSIFICATION ☐ SALARY CHANGE ☐ TRANSFER ☐ LEAVE OF ABSENCE*	STREET ADDRESS			TELEPHONE	STREET ADDRESS			TELEPHONE
		CITY & STATE			ZIP CODE	CITY & STATE			ZIP CODE
		DIVISION	DEPARTMENT			DIVISION	DEPARTMENT		
		REG.-SECT.-PLANT	DISTRICT	ACCOUNT NO.		REG.-SECT.-PLANT	DISTRICT	ACCOUNT NO.	
		JOB TITLE		GRADE		JOB TITLE		GRADE	
		SALARY (US DOLLARS)	DATE REC'D	DATE EMPLOYED	SALARY (US DOLLARS)	INCREASE %MERIT	%PROMOTIONAL	%ADJUSTMENT	
	PAYROLL ENTITY LOCATION	RESON FOR CHANGE TERMINATION PAPERS, 26 WEEKS SEVERANCE PAY, 5 WEEKS VACATION PAY AND ALL SIGNATURES CONCERNING THIS WERE BORNE BY DRESSER ATLAS. Salary $5,062/mo.							

(EXHIBIT CONTINUED)

D

TERMINATION

VOLUNTARY
- ☐ Quit w/o notice*
- ☐ Quit with notice*

INVOLUNTARY
- ☐ Incompetent *
- ☐ Insubordination*
- ☐ Irregular Attendance*
- ☐ Work Attitude *
- ☒ Other *

Would You Consider Re-Employing? ☒ Yes ☐ No* ☐ Conditional*

Necessary Skills For Job? ☐ Yes ☐ No*

Deferred Comp.Participant? ☐ Yes ☐ No

Participation In Stock Purchase Plan? ☐ Yes ☐ No

*BRIEF STATEMENT REQUIRED: ECONOMIC REDUCTION IN WORK FORCE

(SEE ATTACHED MEMO)

CHECK OUT OF PROPERTY	ISSUED YES	ISSUED NO	RETURNED YES	RETURNED NO
PROPERTY	☒	☐	☒	☐
CREDIT CARDS	☒	☐	☒	☐
KEYS	☒	☐	☒	☐

Year to date mileage = 2079, Oct. miles = 170. Issue 10/31/86 paycheck, but hold severance pay for further information.

EMPLOYEE ELIGIBLE FOR = *Severance pay*

VACATION 26 WEEKS __ DAYS __ HOURS PAY = 5 WKS

MAIL FINAL CHECK TO
401 Glendale Ave.
Houma, LA 70360

RETURNED TO
Lee Snyder

CHECK-OUT OF EXPENSE ADVANCE

- ☐ NO EXPENSE ADVANCE ISSUED
- ☐ PAID $___ TO SUPERVISOR
- ☐ DEDUCT $___ FROM EXPENSE REPORT
- ☐ DEDUCT $___ From Salary Checks

DATE OF EMPLOYMENT
6/27/55

JOB TITLE
Sr. Sales. Rep. E-6

(EXHIBIT CONTINUED)

E	APPROVAL /s/ [A.L. Snyder]	DATE 10-22-86	APPROVAL	DATE	APPROVAL /s/ [J.A.Larkin]	DATE 10/2?	APPROVAL /s/ [J.McCullar]	DATE 10/27/86
	APPROVAL	DATE	APPROVAL	DATE	APPROVAL	DATE	APPROVAL /s/ [A.A.Gibson]	DATE 10/27/86

DISTRIBUTION:

BLUE - INDUSTRIAL RELATIONS
WHITE - PAYROLL
CANARY - DIVISION AUTHORITY
GOLDENROD - DEPARTMENTAL AUTHORITY
CANARY - AREA AUTHORITY
PINK - BENEFITS
WHITE - EXTRA COPY
GREEN - REQUESTING AUTHORITY

[Logo Unreadable]

Dresser Atlas
Oilfield Services Group

INTEROFFICE CORRESPONDENCE

TO JIM LARKIN DATE OCTOBER 22, 1986

FROM LEE SNYDER SUBJECT CALVIN F. RHODES

COPY GARY WHITNEY
JACK GIVENS
JAMES SEWELL

The main reason for the termination of Mr. C.F. Rhodes was his lack of product mix. Weakness in downhole equipment expertise combined with perforating knowledge resulted in substandard job performance.

/s/
Lee Snyder

LS:jc